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Challenges and Risks for Ukraine

Article 124 of the Rome Statute

Article 124 of the Rome Statute: Challenges and Risks for Ukraine

Introduction

Ukraine is at a crucial juncture in its relationship with international law. As the country grapples with the ongoing aggression from Russia, it is also striving to solidify its standing within the global legal framework. President Volodymyr Zelenskyy's recent submission of a bill to the Verkhovna Rada for the ratification of the International Criminal Court (ICC) Statute represents a pivotal moment in Ukraine's pursuit of justice. However, a significant clause in this draft legislation a declaration that Ukraine would not accept ICC jurisdiction over war crimes committed by its nationals for a seven-year period raises serious concerns about the potential erosion of the very principles of justice that Ukraine seeks to champion.

The ICC's Role and Ukraine's Position

The ICC, established by the Rome Statute in 1998, was designed to prosecute individuals for the gravest offenses: genocide, war crimes, crimes against humanity, and the crime of aggression. The Court's jurisdiction typically applies under three conditions: when crimes are committed on the territory of a State Party, when crimes are perpetrated by nationals of a State Party, or when a situation is referred to the Court by the United Nations Security Council. Neither Ukraine nor Russia is currently a party to the ICC Statute, which makes a Security Council referral often the most effective means of ensuring accountability highly unlikely due to Russia's veto power as a permanent member.

Despite not being a State Party, Ukraine has taken significant steps to engage with the ICC. Through ad hoc declarations in 2014 and 2015, Ukraine accepted ICC jurisdiction over crimes committed on its territory since November 2013. These declarations have allowed the ICC to investigate the conflict in Ukraine, including alleged war crimes and crimes against humanity. The ratification of the ICC Statute would represent a long-term commitment by Ukraine to international criminal justice, extending the Court's jurisdiction to crimes committed by Ukrainian nationals outside the country and allowing Ukraine to participate fully in the Assembly of States Parties, including the nomination of judges and the proposal of amendments to the ICC Statute.

Legal Analysis: The Article 124 Declaration

However, the inclusion of an Article 124 declaration in the draft ratification bill raises several complex legal issues. Article 124 of the Rome Statute allows states to declare that they do not accept ICC jurisdiction over war crimes committed by their nationals or on their territory for a period of seven years following ratification. This provision was a compromise reached during the Rome Conference to accommodate states that were initially hesitant about the Court's broad jurisdictional reach, particularly over war crimes.

Legal scholars have long debated the implications of Article 124. The article was intended as a transitional measure, allowing states time to adjust to the new international legal order. However, its practical impact has been minimal, with few states choosing to invoke it. Moreover, the Assembly of States Parties decided in 2015 to delete Article 124 from the Statute, although this amendment has not yet come into force due to the procedural requirements for its adoption by two-thirds of the States Parties.

The inclusion of an Article 124 declaration in Ukraine's ratification bill is problematic for several reasons. Firstly, the declaration would not have retroactive effect, meaning that crimes committed by Ukrainian nationals since 2013 would still be subject to ICC jurisdiction under the existing ad hoc declarations. Secondly, there is significant uncertainty about the legal validity of such a declaration in Ukraine's case. Given Ukraine's prior acceptance of ICC jurisdiction through the 2015 declaration, the ICC could interpret the Article 124 declaration as invalid or, at the very least, as limited in scope. It might apply only to crimes committed entirely outside Ukraine by Ukrainian nationals, which are unlikely to be the primary focus of ICC investigations.

Moreover, the legal ramifications of the Article 124 declaration could extend beyond Ukraine's nationals. If the ICC were to accept the declaration as valid, it might interpret it as applying to all crimes committed on Ukrainian territory. This interpretation could inadvertently grant Russian nationals immunity from prosecution for war crimes committed in Ukraine, undermining Ukraine's efforts to hold Russian officials accountable for their actions.

Historical Context: A Legacy of Legal Battles

Ukraine's engagement with international law and institutions has been shaped by its tumultuous history. Since gaining independence from the Soviet Union in 1991, Ukraine has struggled with internal and external challenges,

including political corruption, economic instability, and territorial disputes. The annexation of Crimea by Russia in 2014 and the subsequent conflict in eastern Ukraine marked a turning point, prompting Ukraine to seek greater

integration with Western institutions and legal frameworks.

Historically, Ukraine's relationship with international law has been marked by a cautious approach. While Ukraine has ratified numerous international treaties and conventions, its commitment to international legal mechanisms has often been tempered by concerns over sovereignty and national security. The decision to accept ICC jurisdiction in 2014 and 2015 was a bold step, reflecting Ukraine's desire to leverage international law as a tool for securing justice in the face of Russian aggression. However, this move also exposed Ukraine to

potential scrutiny by the ICC for actions taken by its own forces, highlighting the delicate balance between pursuing accountability and safeguarding national interests.

The inclusion of the Article 124 declaration in the ratification bill can be seen as part of this historical legacy a cautious attempt to protect Ukraine's nationals from international prosecution while still engaging with the ICC. However, this approach risks repeating past mistakes, where short-term considerations have undermined Ukraine's long-term strategic goals.

International Reactions: A Mixed Response

The international response to Ukraine's potential ratification of the ICC Statute, and particularly the inclusion of the Article 124 declaration, has been mixed. On one hand, Ukraine's allies in the West, particularly within the European Union and the United States, have welcomed Ukraine's continued engagement with international legal mechanisms as a positive step towards accountability. The EU, in particular, has consistently supported Ukraine's efforts to seek justice through the ICC, viewing it as part of Ukraine's broader alignment with European values and legal standards.

However, there are concerns among international legal experts and human rights organizations about the implications of the Article 124 declaration. Critics argue that by including this provision, Ukraine risks

undermining its credibility as a champion of international law and justice. Human Rights Watch, Amnesty International, West support, and other NGOs have expressed alarm that the declaration could be seen as an attempt to shield Ukrainian nationals from prosecution, thereby weakening the overall effectiveness of the ICC's mandate.

These concerns are not without merit. The ICC's jurisdiction is based on the principle of complementarity, which means that the Court only steps in when national jurisdictions are unable or unwilling to prosecute serious crimes. By invoking Article 124, Ukraine could be perceived as signaling a reluctance to fully commit to this principle, potentially jeopardizing its moral and legal standing on the international stage.

Implications for Relations with Allies

Ukraine's decision on how to proceed with the ICC ratification will have significant implications for its relations with key allies. The United States, while not a party to the ICC, has provided substantial military and financial support to Ukraine in its fight against Russian aggression. However, the U.S. has historically been wary of the ICC, fearing that its own military personnel could be subject to prosecution. If Ukraine were to fully embrace ICC jurisdiction without reservations, it could complicate U.S. support, particularly if American officials fear that the ICC could expand its investigations to include U.S. nationals involved in Ukraine.

Conversely, Ukraine's European allies are likely to view the ICC ratification as a litmus test for Ukraine's commitment to the rule of law. The EU has made it clear that adherence to

international legal standards is a prerequisite for deeper integration with European institutions. If Ukraine's ratification of the ICC Statute is perceived as half-hearted or compromised by the Article 124 declaration, it could strain relations with the EU and other European partners, potentially affecting Ukraine's aspirations for closer ties with the West.

The potential fallout from a perceived weakening of Ukraine's commitment to international law could also extend to other multilateral forums. Ukraine's efforts to establish a Special Tribunal for the Crime of Aggression and a Register of Damage to facilitate reparations for the victims of the conflict depend heavily on international support. If Ukraine is seen as backtracking on its commitment to international justice, it could lose crucial backing for these initiatives, weakening its overall position in the international arena.

Upholding the Rule of Law: A Strategic Imperative

In light of these considerations, it is clear that Ukraine's approach to the ICC ratification must be carefully calibrated. The inclusion of the Article 124 declaration, while understandable from a national security perspective, poses significant risks to Ukraine's international standing and its ability to hold Russia accountable for its actions. By ratifying the ICC Statute without this provision, Ukraine would send a strong message to the world that it is committed to upholding the rule of law, even

when it involves difficult and potentially uncomfortable decisions.

Such a move would also strengthen Ukraine's moral authority in the ongoing conflict with Russia. By unequivocally embracing the principles of international justice, Ukraine would reinforce its position as a nation committed to accountability and the rule of law. This could have important strategic benefits, not only in terms of securing international support but also in terms of shaping the narrative of the conflict.

In the information war that has accompanied the physical conflict, Ukraine's commitment to international legal standards has been a key element in countering Russian propaganda and securing global sympathy for its cause.

Furthermore, by rejecting the Article 124 declaration, Ukraine would enhance its ability to advocate for a consistent application of international law across the board. One of the criticisms leveled against the ICC is that it has

been selective in its prosecutions, often focusing on African states while being less active in other regions. By ratifying the Statute without reservations, Ukraine would position itself as a leader in the fight for a more equitable and comprehensive application of international justice. This move could bolster its credibility when calling for investigations into Russian war crimes, making it more difficult for critics to dismiss Ukraine's efforts as politically motivated.

The Precedent of Selective Justice

The decision to include the Article 124 declaration also risks creating a precedent of selective justice that could be exploited by other states facing similar conflicts. If Ukraine, a country under severe military threat, were to carve out exceptions to international justice mechanisms, other nations might follow suit, undermining the universality of the ICC. This could weaken the Court's ability to hold individuals accountable for serious international crimes, as more states might seek to shield their nationals from prosecution under the guise of protecting national security or sovereignty.

Historically, the ICC has faced challenges related to accusations of bias and selective prosecution. For instance, many African leaders have criticized the Court for disproportionately targeting African states, while allegedly turning

a blind eye to crimes committed in other regions. Ukraine's decision could either reinforce these criticisms or, conversely, help dispel them by demonstrating that a non-African state is also subjecting itself to the same rigorous standards.

By rejecting the Article 124 declaration, Ukraine could help strengthen the perception of the ICC as a truly global institution, committed to impartial justice regardless of geography or political considerations. This could also enhance the legitimacy of any future ICC investigations into the Ukrainian conflict, as Ukraine would be seen as having fully embraced the Court's jurisdiction without any reservations or conditions.

The International Legal Community's Perspective

The international legal community is likely to view Ukraine's approach to ICC ratification as a test case for the broader applicability of international criminal justice. Legal experts, scholars, and practitioners will closely analyze the implications of Ukraine's decision, not only for the ICC but also for the future of international law as a whole.

If Ukraine were to include the Article 124 declaration in its ratification, it might be seen as setting a dangerous precedent for other states considering ratification. The legal principle of complementarity, which underpins the ICC's jurisdiction, could be undermined if states begin to routinely invoke Article 124 or other reservations to limit the Court's reach. This

could lead to a situation where the ICC's jurisdiction is significantly weakened, making it more difficult for the Court to fulfill its mandate of prosecuting the most serious international crimes.

On the other hand, if Ukraine ratifies the ICC Statute without any reservations, it could set a powerful example for other states in similar situations. By fully committing to the ICC, Ukraine would demonstrate that even states facing significant internal and external challenges can uphold international legal standards. This could encourage other states to follow suit, strengthening the global system of international criminal justice.

The Geopolitical Implications

The geopolitical implications of Ukraine's decision on ICC ratification are also significant. As Ukraine continues to navigate its complex relationship with Russia, its commitment to international law will be closely scrutinized by both allies and adversaries.

For Russia, Ukraine's potential ratification of the ICC Statute represents a direct challenge to its narrative of the conflict. Russia has consistently denied any involvement in the conflict in eastern Ukraine and has portrayed its actions in Crimea as lawful. By ratifying the ICC Statute, Ukraine would not only bolster its legal case against Russia but also increase the pressure on Moscow to account for its actions.

This move could also have broader implications for Russia's relations with other countries. As the ICC begins to investigate potential war crimes in Ukraine, other states may be compelled to take a clearer stance on the conflict, potentially leading to increased diplomatic isolation for Russia. Moreover, the prospect of ICC investigations into Russian actions could further complicate Russia's relationships with states that are already wary of Moscow's aggressive foreign policy.

For Ukraine's Western allies, the decision on ICC ratification will be a litmus test for Ukraine's commitment to the rule of law and international norms. The European Union, in particular, has placed a strong emphasis on the

importance of human rights and the rule of law in its relations with Ukraine. A decision to ratify the ICC Statute without reservations would likely be welcomed by the EU as a positive step towards deeper integration with European legal and political structures.

However, the United States, which has a more ambivalent relationship with the ICC, might view Ukraine's decision through a different lens.

While the U.S. has provided significant support to Ukraine, it has also expressed concerns about the potential implications of ICC investigations for its own nationals. If Ukraine were to fully embrace ICC jurisdiction, it could lead to tensions with Washington, particularly if the U.S. fears that the Court could expand its investigations to include American personnel involved in supporting Ukraine.

A Strategic Decision for Ukraine's Future

Ultimately, Ukraine's decision on how to proceed with ICC ratification will have far-reaching consequences, not only for its own legal and diplomatic standing but also for the future of international criminal justice. The inclusion of the Article 124 declaration, while seemingly a pragmatic measure to protect national interests, could have unintended consequences that undermine Ukraine's broader strategic goals.

By ratifying the ICC Statute without reservations, Ukraine would be making a bold statement of its commitment to international law and justice. This move would enhance its moral authority, strengthen its position in the conflict with Russia, and reinforce its relationships with key international partners. Moreover, it would contribute to the broader effort to establish a more robust and impartial system of international criminal justice.

Conversely, by including the Article 124 declaration, Ukraine risks weakening its international standing and undermining the very

principles it seeks to uphold. While the short-term benefits of such a declaration may be appealing, the long-term costs could be significant, both for Ukraine and for the global fight against impunity.

In a world where the principles of international law are increasingly under threat, Ukraine's decision on ICC ratification will be closely watched by states, international organizations, and civil society alike. The path Ukraine chooses will not only shape its own future but also set a precedent for other nations facing similar challenges.

As Ukraine continues to fight for its sovereignty and territorial integrity, it must also consider the broader implications of its actions on the international stage. Upholding the rule of law, even in the face of adversity, is not only a legal obligation but also a strategic imperative for Ukraine as it seeks to secure a just and lasting peace.

Conclusion: The Balance Between Justice and Sovereignty

The dilemma Ukraine faces in ratifying the ICC Statute without reservations encapsulates the broader struggle between the demands of justice and the imperatives of sovereignty. In a world where states are increasingly asserting their sovereignty in the face of global challenges, the ICC represents a crucial mechanism for ensuring accountability for the most serious international crimes.

For Ukraine, the decision to ratify the ICC Statute is not just a legal or diplomatic issue; it is a strategic choice that will have profound implications for its future. By embracing the ICC without reservations, Ukraine would be reaffirming its commitment to the principles of international law and justice, even as it faces one of the most significant challenges in its modern history.

This decision would not be without risks, but it is a necessary step if Ukraine is to continue positioning itself as a leader in the global fight for justice. In the end, the choice Ukraine makes will send a powerful message to the world about its values and its vision for the future.

As the international community continues to grapple with the challenges of upholding the rule of law in an increasingly complex and interconnected world, Ukraine's decision on ICC ratification will serve as a crucial test of the strength and resilience of the international legal order.